No. 12967

United States Court of Appeals

FOR THE NINTH CIRCUIT

LUCY K. WARD, Next Friend of Hattie Kulamanu Ward, and LUCY K. WARD and KATHLEEN WARD,

Appellants,

vs.

LANI W. BOOTH and MELLIE E. HUSTACE and HAWAIIAN TRUST COMPANY, LIMITED, in Its Corporate Capacity and as Guardian of the Estate of Hattie Kulamanu Ward,

Appellees.

Appeal from the Supreme Court of the Territory of Hawaii

APPELLANTS' OPENING BRIEF

BOUSLOG & SYMONDS
HARRIET BOUSLOG
63 Merchant Street
Honolulu 13, Hawaii
Attorneys for Appellants.

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JURISDICTIONAL STATEMENT

This is an appeal pursuant to Section 1293 of the New Judicial Code from a final decision of the Supreme Court of the Territory of Hawaii made and entered on February 2, 1951 (R. 63-80, 104-105), rehearing denied on April 18, 1951 (R. 102-103), in two cases consolidated for hearing, argument and decision by the court below (R. 61-62). Notice of appeal to this Court was filed in the court below on May 17, 1951 (R. 3) and a petition for appeal was filed and allowed on May 17, 1951 (R. 4-16).

By appeal in cause No. 2761 (R. 52) in the court below, and by writ of error in cause No. 2762 (R. 53), appellants unsuccessfully sought reversal of orders of the Circuit Court of the First Judicial Circuit, at Chambers, in Probate, the Honorable Albert M. Cristy presiding, appointing the Hawaiian Trust Company, Limited, Guardian of the Estate of Hattie Kulamanu Ward, vacating the appointment of Lucy K. Ward as next friend of Hattie Kulamanu Ward, vacating a restraining order against the Hawaiian Trust Company, Limited, and denying without hearing on the merits a motion to vacate the order appointing the Hawaiian Trust Company, Limited, as such guardian, or to remove it, and for other relief. Jurisdiction of the court below was based on Chapters 182 and 186 of Revised Laws of Hawaii, 1945.

The petition for appeal and assignments of error set forth facts showing jurisdiction of this Court under Section 1293 of Title 28 of the United States Code in that the case involves the Constitution of the United States and in that the value in controversy exceeds $5,000.00 (R. 10-16).

STATEMENT OF THE CASE

Factual Background

Hattie Kulamanu Ward, the alleged incompetent, who appeals by Lucy K. Ward, next friend, is a woman of approximately eighty years of age, and is the owner of property in the Territory of Hawaii of the value of approximately one million dollars.

Appellants Lucy K. Ward and Kathleen Ward are sisters of Hattie Kulamanu Ward. Appellees Lani W. Booth and Mellie E. Hustace are likewise sisters of Hattie Kulamanu Ward. These four sisters and Cenric Nourse Wodehouse, only child of a deceased sister, Mae Wodehouse, are the heirs apparent of Hattie Kulamanu Ward.

Appellee, Hawaiian Trust Company, Limited, was appointed guardian of the estate of Hattie Kulamanu Ward by the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, at Chambers, in Probate, the Honorable Albert M. Cristy, presiding. The legal propriety of this appointment is the primary issue involved in the proceedings.

Appellants Lucy K. Ward and Kathleen Ward and Hattie Kulamanu Ward have lived together in close and harmonious relationship during the entire life of the three of them, at an estate known as the Old Plantation. A considerable portion of the estate of Hattie Kulamanu Ward consists of her interest in the Old Plantation, which she holds as joint tenant with her sisters Lucy and Kathleen, with rights of survivorship.[1] This estate consists of approximately 23 acres of land closely adjacent to downtown Honolulu, a large portion of which is occupied by the three sisters as their home, and the remaining portions of which have been developed as business and industrial property and produce substantial income for the three sisters.

For a number of years prior to January, 1949, Lucy K. Ward assisted her sister, Hattie Kulamanu Ward in the management of her property, acting as attorney in fact.

In July, 1947, Lucy K. Ward, for herself and her sister Hattie Kulamanu Ward, acquired as joint tenants with rights of survivorship a large ranch on the Island of Molokai, investing for that purpose $200,000 of her own funds and a like amount of her sister's funds. The money for the purchase of the ranch was secured by pledging securities of the two sisters for a bank loan. The propriety of this transaction was questioned by appellees and by the circuit judge.

In addition to stocks and bonds in various business cor-

[1] This property was deeded to the three sisters jointly, with rights of survivorship, by their mother, Victoria Ward, over twenty years ago. Lani W. Booth and Mellie Hustace have no interest in this property.

porations, Hattie Kulamanu Ward is the owner of shares of stock in a family corporation known as Victoria Ward, Limited, which has substantial land holdings closely adjacent to downtown Honolulu. Prior to March, 1949, Lucy K. Ward and Kathleen Ward were officers and managing directors of this family corporation. Hattie Kulamanu Ward was likewise a director. The 5,200 shares of issued and outstanding stock of Victoria Ward, Limited, are held as follows:

Hattie Kulamanu Ward, daughter of Victoria Ward	1,230 shares
Lucy K. Ward, daughter of Victoria Ward	1,222 shares
Kathleen Ward, daughter of Victoria Ward	1,222 shares
Cenric Nourse Wodehouse, son of Mae Wodehouse, deceased, daughter of Victoria Ward	642 shares
Lani W. Booth, daughter of Victoria Ward	874 shares
Mellie E. Hustace, daughter of Victoria Ward	10 shares

In 1948, a rupture occurred in the Ward family relations over the discharge by Lucy K. Ward and Kathleen Ward of Edward Hustace, grandson of appellee Mellie E. Hustace, as an employee of Victoria Ward, Limited, and on November 20, 1948, appellees Lani W. Booth and Mellie E. Hustace filed a petition in the Circuit Court of the First Judicial Circuit, at Chambers, in Probate, to have Hattie Kulamanu Ward declared insane and a guardian appointed for her. They sought and obtained the appointment of the Hawaiian Trust Company, Limited, as such guardian.

Appellants opposed the appointment of the Hawaiian Trust Company as such guardian. In the hearing on the guardianship petition, through counsel, Lucy K. Ward and Kathleen Ward asked for the appointment of Lucy K.

Ward, or in the alternative Kathleen Ward, as guardian of Hattie Kulamanu Ward. When this request was denied, counsel asked for the appointment of any trust company other than the Hawaiian Trust Company.[2] Subsequently, after the appointment of the guardian, by verified motion, Lucy K. Ward, as next friend of Hattie Kulamanu Ward, sought a further hearing on the issue of competency and asked that if after further hearing the court still felt a guardian was necessary, that she, Lucy K. Ward, or Kathleen Ward be appointed. If the court, after hearing of the motion, found neither were suitable, or that they had conflicting interests, the court was asked to appoint any disinterested person with knowledge of the affairs of Hattie Kulamanu Ward.

The verified motion alleged that the Hawaiian Trust Company had antagonistic and conflicting interests with the estate of Hattie Kulamanu Ward and with Victoria Ward, Limited, and alleged further that its appointment as guardian would, by reason of its control as such guardian of the pivotal shares of stock owned by Hattie Kulamanu Ward in Victoria Ward, Limited, and by reason of its alliance with petitioners, result in the ouster of the existing management of the family corporation, without the court being fully apprised of the facts involved in the dispute.

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[2] At the hearing on the petition for the appointment of a guardian, Lucy K. Ward, as an intervenor, was represented by Attorney Wendell Carlsmith, and appellant Kathleen Ward was represented by Attorney Phil Cass. Neither Lucy nor Kathleen Ward was present in person. Attorney Carlsmith raised no objection to the appointment of the Hawaiian Trust Company, Limited, as guardian. Attorney Cass, however, spoke on behalf of both Kathleen and Lucy Ward, and opposed the appointment of the Hawaiian Trust Co., Limited, asked for the appointment of Lucy or Kathleen Ward as guardian, and after the court indicated that he would not appoint either of them, the appointment of any trust company other than the Hawaiian Trust Company, Limited (R. 118-143, particularly 137-138, 141). When the verified motion to remove the guardian came on for hearing, an offer of proof was made to show that Attorney Carlsmith had not carried out his instructions (R. 182).

The control of Victoria Ward, Limited, by petitioners was alleged to be the motive of petitioners in seeking to have Hattie Kulamanu Ward declared insane, and to have their nominee, the Hawaiian Trust Company, Limited, appointed as such guardian. It was further alleged that the appointment of the Hawaiian Trust Company, Limited, was not in the interest of Hattie Kulamanu Ward. The facts on which these allegations were based were fully set forth in the verified motion (R. 31-47).

Proceedings in Territorial Circuit Court

When Hattie Kulamanu Ward did not appear on the return day of the guardianship petition, a guardian ad litem was appointed. The petition was heard on January 13, 1949. When Attorney Cass sought to cross-examine witnesses for the petitioners, Judge Cristy ruled that Kathleen Ward and Lucy K. Ward had no standing to object to the appointment of the Hawaiian Trust Company, Limited, and that they had conflicting interests as a matter of law, and that he would not consider their appointment.

When Attorney Cass sought to cross-examine witnesses for the petitioners as to their motives for the filing of the petition, and in seeking the appointment of the Hawaiian Trust Company, Limited, as guardian, Judge Cristy ruled motive irrelevant. Attorney Cass, on behalf of Kathleen and Lucy K. Ward, sought the appointment of any trust company other than the Hawaiian Trust Company. The guardian ad litem stated that the Hawaiian Trust Company, Limited, might have conflicting interests with the estate, but recommended its appointment. No finding of service on Hattie Kulamanu Ward was made,[3] nor was any finding made that she was an insane person, nor any decree entered to that effect, by Judge Cristy. No guardian of the

[3] The only showing of service appears in the Bailiff's Return (R. 25).

person was appointed, it appearing that there was no necessity as she was being well cared for by Lucy K. Ward and Kathleen Ward. On January 14, an order appointing the Hawaiian Trust Company, Limited, as guardian of the estate was entered.

On Saturday, March 12, 1949, Lucy K. Ward, through present counsel, applied to the court[4] for an order appointing her as next friend of Hattie Kulamanu Ward for the purpose of representing her in a motion to vacate the order appointing the Hawaiian Trust Company, Limited, as guardian of Hattie Kulamanu Ward, and for other relief.[5] The motion for appointment as next friend was supported by an affidavit of Lucy K. Ward alleging, among other things, that it was necessary for a next friend to be appointed to represent Hattie Kulamanu Ward because she had been declared incompetent and the appointed guardian could not prosecute the action because it was adversary to the guardian. Upon the entering of such an order, Lucy K. Ward, next friend of Hattie Kulamanu Ward, filed a verified motion to vacate the order appointing the guardian and for other relief.

Pursuant to the prayer of the motion, a temporary restraining order was entered, enjoining the Hawaiian Trust Company, Limited, from voting the stock of Victoria Ward, Limited, belonging to the estate of Hattie Kulamanu Ward until further order of the court, and an order to show cause issued against all appellees returnable on the following Wednesday, March 16, 1949.

The verified motion to remove the guardian and for

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[4] Judge Cristy being absent because of illness, the matter was presented to the Honorable Willson C. Moore, and by him made returnable before Judge Cristy on the following Wednesday.

[5] There can be no question that the proceeding for Hattie Kulamanu Ward by next friend is proper. *Kalanianaole v. Liliuokalani,* 23 Haw. 457; *Gray v. Parke,* 155 Mass. 433; *Ryder v. Topping,* 15 Ill. App. 216. See also as to right of next friend to appeal, *Fulmer v. Wilkins,* 37 S.E. (2d) 405.

other relief (R. 31-47) alleged that the order appointing the said guardian was entered without the court being fully apprised of the facts, and upon certain fraudulent representations and concealments of material fact, as a result of which a full and fair hearing had not been had. The verified motion and offers of proof made on the return day of the motion show in part:

1. That Hattie Kulamanu Ward had been examined by a reputable alienist, who found her competent to select the person she desired to manage her affairs.

2. That the motives of the two petitioning sisters, who sought to have Hattie Kulamanu Ward declared incompetent, were suspect for reasons fully set forth in the verified motion.

3. That the Hawaiian Trust Company had conflicting interests which made it an unsuitable guardian.

4. That Hattie Kulamanu Ward's property was and had been properly cared for by a person chosen by her, she having, according to proferred evidence, competence to select the person she wished to assist her.

5. That the appointment of the Hawaiian Trust Company as guardian would change the management of the family corporation, and that by so appointing the nominee of the two petitioning sisters, the Hawaiian Trust Company, the court was taking sides in a family dispute without any knowledge of the facts or merits of the respective sides in said dispute, and was not only depriving Hattie Kulamanu Ward of the right to manage her property and estate or select whom she desired to manage it, but was also effectively robbing Lucy K. Ward and Kathleen Ward —because of the unique circumstances—of the right to manage their own property without interference by a guardian unacceptable and antagonistic to them, or to have an impartial person or trust company not antagonistic to them and to their interests, and not committed to a course of

action against their wishes, participating in the management of the property which they jointly owned with Hattie Kulamanu Ward.

On March 15, 1949, appellees filed a return in effect denying the allegations of the verified motion.

On the return day of the order to show cause, Judge Cristy denied the motion without hearing on the merits, vacated the order appointing Lucy K. Ward next friend of Hattie Kulamanu Ward, and dissolved the temporary restraining order. Judge Cristy attacked the honesty and integrity of Lucy K. Ward, and accused her of coming into court with unclean hands, assisted by counsel. The court charged that the record indicated that Hattie Kulamanu Ward had been incompetent over a period of years, and that Lucy Ward, acting under a power of attorney, had mortgaged large amounts of her stock to take a joint tenancy in a ranch with rights of survivorship, thus feathering her own possible bed in case she survives her sister, to get into her hands property that has a value of some $350,000 or $400,000, and had "hocked" her ward's property.

Counsel stated that the comments of the court showed bias and prejudice against Lucy K. Ward, suggested to the court his disqualification, and asked him to permit the matter to be heard by another judge. Counsel pointed out that there was nothing in the record to indicate that Lucy Ward had done anything except to care properly and fully, free of charge, for her sister's property, and that the charges of concealing the incompetency of her sister, feathering her own nest, and hocking her sister's property were unsupported by any evidence in the record. An appeal was noted from the order vacating the appointment of Lucy K. Ward as next friend of Hattie Kulamanu Ward.

Proceedings in Supreme Court of the Territory of Hawaii

Thereafter, an appeal to the Supreme Court of the Territory of Hawaii was perfected by Lucy K. Ward, next

friend of Hattie Kulamanu Ward. This appeal was directed to all errors of fact and law apparent on the record from the time of her appointment as next friend by Judge Moore to and including the order vacating her appointment, dissolving the temporary restraining order, and denying the motion to vacate the appointment of the guardian or to remove it on the ground of unsuitability, under the provisions of Section 12529, Revised Laws of Hawaii, 1945.

A writ of error was also perfected to the Supreme Court of the Territory of Hawaii by (1) Lucy K. Ward, next friend of Hattie Kulamanu Ward, (2) Lucy K. Ward and Kathleen Ward, sisters of Hattie Kulamanu Ward who intervened by counsel in the incompetency proceeding. The writ of error was directed toward all errors of law apparent on the entire record, including the appointment of the guardian and the verified motion to vacate the appointment of the guardian or to remove it for unsuitability, and for other relief.

In the consolidated appeal and writ of error proceedings before the Supreme Court, appellants urged that:

1. Section 12509, Revised Laws of Hawaii, 1945, providing for the appointment of guardians of insane persons is unconstitutional because it does not provide for a jury trial of the issue of sanity in violation of the due process clause of the Fifth Amendment and the Seventh Amendment to the Constitution of the United States.

2. Errors of law and abuse of discretion apparent on the face of the record of the guardianship proceedings entitled appellants to a reversal of the order appointing the guardian. The specified errors were:

a. The proceedings were defective because no finding of notice required by the statute was made by the probate judge.
b. On the basis of the facts appearing in the record, the appointment of the Hawaiian Trust Company, Limited, was error of law and abuse of discretion.

c. The refusal of the probate judge to permit examination of petitioners as to motive was prejudicial error.
d. The ruling of the probate judge that the intervening sisters, Lucy K. Ward and Kathleen Ward, had no standing to object, and that they had conflicts of interest as a matter of law was error and abuse of discretion prejudicial to appellants.
e. The appointment of a guardian of the estate of Hattie Kulamanu Ward was error of law because there was no finding that she was insane as required by Section 12509.

3. The probate judge abused his discretion in refusing to permit a hearing on the merits of the motion of the next friend of Hattie Kulamanu Ward to vacate the order appointing the guardian and to reopen the matter for further hearing on the issue of competency, and for other relief, on the record of the hearing on the petition and the facts set forth in the verified motion.

4. Appellant Lucy K. Ward, as next friend of Hattie Kulamanu Ward, was entitled as a matter of right to a hearing on that part of the verified motion which sought to remove the appointed guardian as unsuitable, and the probate judge's refusal to allow such hearing on the merits was error as a matter of law and an abuse of discretion which substantially prejudiced the rights of appellant.

5. By reason of the manifest bias and prejudice shown by the probate judge against appellant, Lucy K. Ward, as next friend of Hattie Kulamanu Ward, she was denied a full and fair hearing and deprived of due process of law on her verified motion to vacate the appointment of the guardian or to remove the guardian.

The Supreme Court of the Territory of Hawaii affirmed all the orders of the Circuit Judge at Chambers appealed from (R. 63-80). It ruled:

1. That the Seventh Amendment to the Constitution does not apply to guardianship proceedings in insanity cases.

2. That Section 12529, Revised Laws of Hawaii, 1945, dealing with the removal of guardians, operates only in the future and grants discretionary authority to remove an appointed guardian for events occurring after his appointment.
3. That the court need not consider questions in probate hearings at chambers which are not made the subject of exceptions, and will do so only if it is of the opinion that manifest error patently appears which injuriously affects substantial rights.
4. That the granting or denial of a hearing on the merits of a motion to vacate an order appointing a guardian is within the sound discretion of the presiding judge, and his denial will not be disturbed unless an abuse of discretion appears, and that no such abuse was shown.

A petition for rehearing and reargument, urging seven grounds for reconsideration by the court was filed. It was urged that on the basis of the allegations of the verified motion alone, the very minimum that equity and justice would require is that the probate judge remain neutral in the family dispute and appoint a neutral or impartial person or agency as guardian, and not one antagonistic to, or one committed to a course of action acceptable to participants on one side of the dispute.

It was further urged that federal courts which had considered the issue of the right to a jury trial on the issue of sanity had held that such right was guaranteed by the Seventh Amendment to the Constitution.

It was likewise urged that the court's holding that exceptions must be taken in probate proceedings at chambers in order to raise the questions as of right on appeal was contrary to all previous decisions of the court and the universal practice in the Territory.

Rehearing was denied in a brief per curiam opinion (R. 103).

SPECIFICATION OF ERRORS RELIED ON IN THIS COURT

Assignment No. 1

The Supreme Court of the Territory of Hawaii, hereinafter referred to as the "Court," erred in making and entering its Opinion and Decision on the 2nd day of February, 1951, in the above-entitled Court and causes.

Assignment No. 2

The Court erred in making and entering its Opinion and Decision denying the Petition for Rehearing on the 18th day of April, 1951, in the above-entitled Court and cause.

Assignment No. 3

The Court erred in making and entering its Judgment on Writ of Error and Decree on Appeal, on the 5th day of May, 1951, in the above-entitled Court and cause.

Assignment No. 4

The Court erred in its conclusion that the Fifth and Seventh Amendments to the Constitution of the United States do not guarantee to person resident in the Territory of Hawaii, including Hattie Kulamanu Ward, who here appears by her next friend Lucy K. Ward, the right to a jury trial on the issue of sanity, and hence that Section 12509 of Revised Laws of Hawaii is valid and not in contravention of these Amendments.

Assignment No. 5

The Court erred in making and entering its Judgment on Writ of Error and Decree on Appeal in that Section 12509, Revised Laws of Hawaii, 1945, as construed and applied in these causes, denies appellants due process of

law in violation of the Fifth Amendment to the Constitution of the United States in the following respects:

a. As construed and applied, this section permits a finding of incompetency without a determination or finding of notice as required by statute.

b. As construed and applied, this section permits the appointment of a guardian ad litem for an adult alleged to be incompetent, without notice to the alleged incompetent.

c. As construed and applied, this section permits the appointment of a guardian which has or may have conflicting interest.

d. As construed and applied, this section permits appointment as guardian of nominee of two petitioning sisters, over the opposition of two intervening sisters with equal interests and equal rights.

e. As construed and applied, this section authorizes appointment of a guardian on petition of some relatives without allowance of a full and fair hearing to intervening relatives—with equal interests and rights, who opposed petition—in respect to motives of petitioners in seeking appointment of specific guardian.

f. As construed and applied, this section denies full and fair hearing to intervenors who have equal status with petitioners, and gives them no standing to object to the selection of a proposed guardian or to propose themselves or another guardian.

g. In that this section, as construed and applied, permits the appointment of a guardian without a finding of insanity.

Assignment No. 6

The Court erred in making and entering its Judgment on Writ of Error affirming the order appointing the Ha-

waiian Trust Company, Limited, guardian of the estate of Hattie Kulamanu Ward, and making and entering the Decree on Appeal affirming the order vacating the appointment of Lucy K. Ward, next friend of Hattie Kulamanu Ward, dissolving the temporary restraining order and denying the motion to set aside the order appointing the guardian or to remove the guardian, in that there is error and abuse of discretion which amounts to a denial to appellants of due process of law and a denial of a full and fair hearing on the basis of the allegations contained in the verified motion and the offers of proof made on the return day.

Assignment No. 7

The Court erred in refusing to consider on the merits certain assignments of error on the ground that they were not made the subject of exceptions, it being settled law in the Territory that in proceedings in chambers exceptions are unnecessary and that errors apparent on the face of the record may be corrected by writ of error regardless of the taking of exceptions.

Assignment No. 8

The Court erred in its conclusion that Section 12509 does not afford appellants, as a matter of right, a hearing on the merits of the motion to remove the Hawaiian Trust Company, Limited, as guardian on the ground of unsuitability.

Assignment No. 9

The Court erred in its conclusion that the manifest bias and prejudice shown by the circuit judge against appellant Lucy K. Ward, next friend of Hattie Kulamanu Ward, did not constitute a denial of a fair hearing of the motion to vacate the order appointing the guardian, or to remove the guardian.

STATUTES AND CONSTITUTIONAL AMENDMENTS INVOLVED

I. The Fifth Amendment to the Constitution of the United States

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

II. The Seventh Amendment to the Constitution of the United States

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right to a jury trial shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the common law.

III. Section 12509, Revised Laws of Hawaii, 1945

> *Notice, hearing and appointment of guardian of insane person.* When the relations or friends of any insane person shall apply to any of the judges hereinbefore mentioned to have a guardian appointed for such person, the judge shall cause notice to be given to the supposed insane person of the time and place appointed for hearing the case, not less than fourteen days before the time so appointed. The judge shall also cause notice to be given to the husband, wife, parent, or any child or children of the supposed insane person, if any there be residing within the jurisdiction of the court. In case it shall appear by return of the summons or by affidavit to the satisfaction of the judge that no such person can be found, the judge may appoint a guardian ad litem to protect the interest of the supposed insane person and cause such notice to be given to such guardian ad litem. If after a full hearing it shall appear to the judge that the person in question is insane, the judge shall appoint a guardian of his person or estate or both, with the powers and duties hereinafter specified, and, in case of the appointment of a guardian ad litem, provide for the compensation and reasonable and necessary expenses of such guardian ad litem.

ARGUMENT

I. THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN MAKING AND ENTERING ITS OPINION AND DECISION, IN DENYING THE PETITION FOR REHEARING, AND IN MAKING AND ENTERING ITS JUDGMENT ON WRIT OF ERROR AND DECREE ON APPEAL.

The specific reasons why error is alleged in these actions of the court and the legal grounds of such error are discussed under succeeding points. (Assignments of Error Nos. 1, 2 and 3.)

II. THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN ITS CONCLUSION THAT THE FIFTH AND SEVENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DO NOT GUARANTEE TO PERSONS RESIDENT IN THE TERRITORY OF HAWAII, INCLUDING HATTIE KULAMANU WARD, WHO HERE APPEARS BY LUCY K. WARD, HER NEXT FRIEND, THE RIGHT TO A JURY TRIAL, AND HENCE THAT SECTION 12509 OF REVISED LAWS OF HAWAII, 1945, IS VALID AND NOT IN CONTRAVENTION OF THESE AMENDMENTS. (Assignment of Error No. 4.)

The Seventh Amendment to the Constitution of the United States applies only to courts sitting under the authority of the United States (*Pearson v. Yewdall,* 95 U.S. 294, 296), including courts in the territories (*Webster v. Reid,* 11 How. 437, 460), and the District of Columbia (*Capital Traction Co. v. Hof,* 174 U.S. 1, 5). Thus, while a state might require less than a unanimous jury verdict (*Chicago, R. I. & P. R. Co. v. Ward,* 252 U.S. 18), a territory cannot. (*American Publishing Company v. Fisher,* 166 U.S. 464.)

There can be no question that a state is not prohibited by the due process clause of the Fourteenth Amendment from eliminating jury trials in insanity proceedings. Thus, in *Simon v. Craft,* 182 U.S. 427, the court said, concerning due process of law in insanity hearings:

> The due process clause of the Fourteenth Amendment does not necessitate that the proceedings in a state court should be by a particular mode, but only that there shall be a regular course of proceedings in which notice is given of the claim asserted and an opportunity afforded to defend against it.[6]

But since the Seventh Amendment is a limitation on the power of territories, and it is not a limitation on the power of the several states, the question in respect to Hawaii turns on whether the right to a jury trial in insanity proceedings existed at the time of the adoption of the Bill of Rights to the Constitution, and whether it is a suit at common law within the meaning of the Seventh Amendment. It cannot seriously be questioned that a jury trial was the recognized and accepted method of inquiring into insanity in England and the colonies, prior to the adoption of the United States Constitution.[7]

Thus, in Cooley's Blackstone (4th Ed.), vol. 1, page 261, it is said:

> By the old common law there is a writ de idota inquirendo (of inquiring concerning an idiot), to inquire whether a man be an idiot or not; which must be tried by a jury of twelve men.

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[6] It is to be noted, however, that the issue of sanity in this case was in fact tried by a jury, even though the alleged incompetent was not present.

[7] Appellees, in their brief before the Supreme Court of Hawaii, conceded that "Probably the procedure in most colonies at the time of the Revolution, if they had a procedure, included a jury though some may not." Appellees took the position, however, adopted by the Supreme Court that lunacy proceedings are not suits at common law within the meaning of the Seventh Amendment.

The same author, on page 263, says:

> The method of proving a person non compos is very similar to that of proving him an idiot.

The same view is expressed by Buswell on Insanity, page 35, and in Pomeroy's Equity Jurisprudence, §1312.

The only discussion of this question by the Supreme Court of the Territory of Hawaii prior to the instant case appears in *In Re Atcherley,* 19 Haw. 535. It is there stated that the right to a jury trial in insanity proceedings has been claimed and enforced in Hawaii in only one case—*In Re Atcherley,* 19 Haw. 346. Thereafter, the court said, the Territorial legislature changed the law, the inference being that the legislature took the view that a jury of laymen was ill-qualified to hear and determine the question of whether or not a person is of sound mind, and therefore substituted new procedure.

The Supreme Court of the Territory, after noting that the United States Supreme Court has not specifically passed on this question, states that appellants have cited no clear authority of a lower court holding that a jury trial is a constitutional right in courts of the United States, including the District of Columbia and courts of the territories. To the contrary, it is respectfully shown that the federal cases which consider the problem reach the conclusion that a jury trial of the issue of competency in such courts must be had before a person can be deprived of his liberty and property.

Thus, in *Hager v. Pacific Mutual Life Insurance Co.,* 43 F. Supp. 22, the court said:

> I do not believe that under our Federal and State Constitutions a person can be declared incompetent and have his property taken out of his hand or be placed in confinement without the intervention of a jury and the verdict of a jury declaring him to be non

sui juris. It seems to me that the statute is repugnant to our whole constitutional system.

The very fact that a person is insane or charged with being insane is equally as great if not even a greater reason to make the trial public and before a lawfully constituted jury than in the case of a person charged with crime. Nor should there be permitted a waiver of jury. Possibly without reason or capacity to properly select counsel or to defend himself a provision to permit a waiver of rights seems improper and on the same plane with the provision in Section 216aa-74 that he may demand a jury, which in my judgment is void.

In *In re Bryant,* 3 Mackay 489, 493-494 (Sup. Ct., D.C.), the court held that in the District of Columbia a jury trial was required before a person could be declared or held as a lunatic.

The court said:

This deprivation of the liberty of a citizen upon the ground of lunacy is a matter of very grave importance, because it may easily happen that for fraudulent purposes, perhaps with a view to deprive a person owning property of his control over it, a perfectly sane man might be sent to an asylum by his relations, upon a certificate of two physicians, and be illegally confined there for years.

We hold, therefore, first, that these sections of the Revised Statutes do not contemplate compulsory seclusion in this institution without due process of law. They only open its doors to those who have been properly found to be insane persons. *If they meant anything else they would be unconstitutional.* (Italics supplied.)

And, secondly, we hold that the whole matter of the care of insane persons is regulated by the act of Maryland of 1785, which includes this proceeding of an inquiry by jury.

And in *Burke v. Wheaton,* Fed. Case No. 2165, 3 Cranch C.C. 341, the court held that the mode of ascertaining who are lunatics is by jury trial upon the issuance by the court of a writ *de lunatico inquirendo.*

The Supreme Court of the Territory of Hawaii concedes that Section 12509 is in derrogation of the common law, thus agreeing with appellants that at common law the method of declaration of incompetency differed from our statute in that it could be had only after a jury determined the issue of competency.

The first ten amendments to the Constitution of the United States, known as the Bill of Rights, were proposed by the First Congress at the insistence and demand of the people that personal rights and liberties established by common law at the time of the adoption of the Constitution could never be taken away or infringed upon by the federal government. Among these rights was the right to a jury trial in civil cases as it existed at common law. Even Congress cannot, by laws purporting to set up different legal remedies, deny persons the right to a jury trial as it existed at common law. *Raytheon Mfg. Co. v. Radio Corporation of America,* 76 F. (2d) 943, affirmed 296 U.S. 459, 80 L.Ed. 327.

The Seventh Amendment did not enlarge or abridge the right of jury trial as it existed at the time of the adoption of the Constitution. It guaranteed its preservation as it existed at common law in proceedings of a legal as distinguished from an equitable character. *Fitzpatrick v. Sun Life Assurance Co. of Canada,* 1 F.R.D. 713.

The Supreme Court of the United States has exhaustively examined the nature of the rights guaranteed by the Seventh Amendment.

In *Parsons v. Bedford,* 3 Peters 433, 446, 7 L.Ed. 732, Mr. Justice Story said:

> The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. . . . By common law they meant what the Constitution denominated in the third articles "law"; not merely suits, which the common

> law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit. . . . In a just sense, the amendment, then, may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights. And Congress seems to have acted with reference to this exposition in the Judiciary Act of 1789, ch. 20 (which was contemporaneous with the proposal of this amendment) ; for in the ninth section it is provided that "the trial of issues in fact in the district courts in all causes, except civil causes of admiralty and maritime jurisdiction, shall be by jury;" . . .

See also discussion of authorities on meaning of Seventh Amendment in *Geneux v. Texas & Pacific Ry. Co.,* 98 F. Supp. 405; *People v. One 1941 Chevrolet,* 22 P. 2d. 473 (Cal. App.) .

There seems no legal basis for questioning that the language of the Seventh Amendment means the same as the language in constitutions of the several states that "the right to jury trial shall remain inviolate."

Under such state constitutional provisions, the highest courts of a number of states, including the courts of New York, New Jersey, Pennsylvania, Vermont, Kentucky, and Texas, have held that the right to a jury trial existed at common law in insanity proceedings, and must be preserved.[8]

Maryland

It has long been held in Maryland that the method of determination of the issue of insanity remains in the State

[8] Other courts have reached a contrary conclusion. See, for example, *Sharum v. Meriwether* (Ark.) , 246 S.W. 501, *Ex Parte Scudamore* (Fla.) , 46 So. 279.

of Maryland as it existed under English practice independent of statute.

The leading Maryland case, *Hamilton v. Traber,* 27 A. 229, pages 230 to 232, discusses at great length the history of writs *de lunatico inquirendo,* and determines that the English practice at common law required the trial of the issue by a jury. After the discussion of the English authorities, the court concluded:

> It is repugnant to the plainest dictates of natural justice that one having no interest in or claim against the estate of another should still possess the right to procure a decree stripping the latter of the ownership of his property, and simultaneously adjudging him a lunatic, without the solemn inquisition of a jury, upon a mere ex parte allegation, and substantially ex parte proof, of the owner's mental infirmity. For such a proceeding no precedent has or can be found.

See also *In Re Bristor's Estate,* 81 A. 25, at page 28; *Ex Parte Bickell's Estate,* 149 A. 446, at page 449. In *Perdam v. Lily,* 35 A. 2d 805, the rule of the *Hamilton v. Traber* case is reaffirmed, the court holding that an adjudication of mental incompetency must be based on a finding of the jury under a writ of *de lunatico inquirendo.*

It is apparent that the practice at common law, as construed by the Maryland courts, was that the right to a jury trial was absolute, and could not be waived, it being a condition precedent to the appointment of a guardian.

New York

The leading New York case holding that the right to a jury trial of the issue of insanity is guaranteed by the Constitution of the State of New York preserving inviolate the right to trial by jury as it existed at the time of the constitution is *Sporza v. German Savings Bank,* 84 N.E. 406.

In the *Matter of Perkins,* 173 N.Y.S. 520, at 523, the court held:

> In insanity cases, the alleged insane person is entitled to a trial of the question of fact, not only by the statute, but as a constitutional right. Jurisdiction over lunacy cases was originally exercised by the Court of Chancery, and the custom prevailed on the part of the chancellor, before the Constitution was adopted, to require a trial by jury of the question of the insanity of a person, and therefore that was one of the cases where jury trials were preserved by the Constitution.

To the same effect is *People v. Silleti,* 17 N.Y.S. 2d 947.

New Jersey

The leading New Jersey case is *Re McLaughlin,* 102 A. 439. There the court said:

> When the framers of the Constitution inserted the paragraph providing the right of trial by jury should remain inviolate, they were fully advised of the common-law history of the method of determining the question of lunacy, . . . and intended to perpetuate the system which forbade the finding of lunacy unless by the verdict of a jury.

This case has been followed in *Leick v. Poznick,* 37 A. 2d 302, and *Oswald v. Seidler,* 39 A. 2d 396.[9]

In the *Oswald* case, the court said:

> Only by a jury upon a commission from this Court can a person be declared as incompetent and be divested of all power and control of his affairs and estate. R. S. 3:7-35 et seq., N.J.S.A.; *In Re McLaughlin,* 87 N.J. Eq. 138, 102 A. 439.

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[9] In *In Re A.L.S.,* 63 A. 2d 321, it appears that even though the new constitution of New Jersey of 1947 allowed the legislature to prescribe other methods than jury trial to determine the issue of insanity, the legislature had not done so except in respect to estates involving less than $2,000.00.

Pennsylvania

In *Commonwealth ex rel. Stewart v. Kirkbridge,* 2 Brewst. (Pa.) 419, it appeared that a person had been found to be insane in a proceeding held in Maryland, of which he claimed to have had no notice. The petitioner also claimed that he had been decoyed into an insane asylum in Pennsylvania; that, if he was in fact insane, his malady was not such as to justify his restraint. In passing on the propriety of his detention, the court said:

> I hold to the doctrine that no man can be deprived of his liberty without the judgment of his peers, and that it matters not to the law whether the alleged cause of detention is insanity or crime. Unless there is danger to the public or to the patient or to his estate, he should not be in duress pending the investigation, nor indeed after its conclusion, though adverse to him.

Vermont

In *Shumway v. Shumway,* 2 Vt. 339, it was held that a person charged with insanity had the right to appeal from a determination that he was insane, made in a probate court without a jury, and have the issue of his sanity tried by a jury on appeal. The court said:

> We are fully satisfied, from a view of the British authorities, that the aforementioned statute was made in view of them, intending to give to our citizens as much security for their liberty and property as is enjoyed by the subjects of Great Britain. The right of trial by jury is too well secured to have anyone arbitrarily deprived of a privilege so dear to every American citizen. Our independence cost too much to have our liberty and property wrested from us and we put under guardianship without even the form of a trial. Should we sanction these proceedings, no one in the evening of life could dwell secure, but would tremble at the approach of anyone that entered his door, lest he was then to be called to surrender all that would render life desirable.

Alabama

In *Eslava v. Lepretre,* 21 Ala. 504, 56 Am. Dec. 266, it was held that appointment of a guardian for a lunatic without notice to the lunatic, and without the issue of a writ *de lunatico inquirendo,* and the verdict of a jury thereon is void.

The court said:

> This appointment was made upon no other assurance of the fact of Mrs. Eslava's lunacy than the petition of her husband, without notice to her, and without the issue of a writ *de lunatico inquirendo,* and the verdict of a jury thereon. Without the issue of this writ and the finding of a jury, the county court judge had no power to declare her a lunatic, or to appoint a guardian for her. These proceedings are indispensable to give the county court jurisdiction to make the appointment; and as they were not had, and that court is one of limited jurisdiction, the proceedings on the appointment of guardians are *coram non judice* and void. . . .
>
> There is no order of the county court of Mobile declaring Mrs. Eslava a lunatic or person *non compos mentis.* The nearest approach to it is found in the recitals of the order appointing the guardians, and these are wholly insufficient for that purpose. . . .

Tennessee

In *Johnson v. Nelms,* 100 S.W. (2d) 648, at page 651, the Supreme Court of Tennessee held that under the better authorities it seems to be conceded that the right to jury trial in lunacy proceedings existed at common law, and a statute which denies the right would be unconstitutional.

Kentucky

In *Howard v. Howard,* (Ky.) 1 LRA 610, an action was prosecuted by the plaintiff as next friend of a person he alleged to be of weak mind. The alleged incompetent came

in and denied his weakness of mind or incompetency. After observing that the common law guaranteed a right to jury trial, the court, in considering the proper procedure in such a case, said:

> . . . It seems to us that the issue which thus involves his personal liberty should be settled by his peers—a jury of his country; and for that purpose the chancellor should issue his writ out of chancery, directing an inquiry by a jury into the fact as to whether the mind of the person was so impaired by age, disease or otherwise as to render him incapable of understanding and appreciating his property rights to such an extent as to render him unable to protect himself against designing persons; and upon the verdict of the jury, if in the affirmative, the chancellor should appoint a committee for the person, and allow him to prosecute the suit in his name; but if the verdict should be in the negative, then the suit should be dismissed. . . .

Daley v. Spencer's Committee, 83 S.W. (2d) 502, held specifically that the statute relating to the appointment of a committee in insanity proceedings requires the inquest of a jury as a condition precedent to the appointment of a committee for an alleged incompetent. The court further held that where the facts necessary to confer jurisdiction on the court were required to appear of record in order to sustain the order appointing a committee, and that since it appeared that there was no jury, the order appointing the guardian was absolutely void. The court says, at page 505, that it seriously doubted whether a jury could be waived in such proceedings. The court said:

> Persons—even insane persons—are not to be deprived of their liberty or property without due process of law. While there is no hint of bad faith on the part of the appellants here, the Star Chamber methods of dealing with the person and property of this unfortunate woman cannot be too severely condemned. Con-

stitutional guarantees are to be honored and not ignored.

See also *Hager v. Pacific Mutual Life Insurance Co.,* 43 F. Supp. 22, discussed supra.

Texas

In *White v. White,* 196 S.W. 508 (Tex.), and *Loving v. Hazelwood,* 184 S.W. 355 (Tex.), the court held unconstitutional a statute providing that a commission rather than a jury should try the issue of lunacy. This rule was reaffirmed in *Beardon v. Texas Company,* 60 S.W. (2d) 1031. To the same effect, *Henderson v. Applegate,* 203 S.W. (2d) 548.

California

California has been one of the states holding, at least under commitments for insanity based on inebriation, that a jury trial is not a constitutional requirement. The rationale of the California cases is that insanity proceedings are not ordinary civil actions as defined by the California code, but are special proceedings. See *People v. Loomis,* 80 P. (2d) 1013. Yet, the California courts seem eager to discard the rule adopted by the earlier cases without, however, reversing the earlier cases.

Thus, in *Knight v. Superior Court,* 214 P. (2d) 21, a writ of prohibition was sought from the California District Court of Appeals, to prevent a hearing on incompetency without the intervention of a jury. The court said:

> Two grounds to the opposition of the issuance of the writ are urged: "First, that as a matter of law the Superior Court is right and that the alleged incompetent has no right to trial by jury of that issue. Without reviewing the authorities, this court is definitely of the opinion that the trial court was in error in this respect. . . . It is our view that any court which denies the right of trial by jury in a case where any party

has the constitutional right to it exceeds its jurisdiction.

It is therefore ordered that the demurrer be overruled and that a peremptory writ of prohibition issue as prayed prohibiting the trial court from proceeding with trial other than by trial with a jury.

To the same effect see *Budd v. Superior Court,* 218 Pac. 2nd 103.

It is respectfully submitted that the right to a jury trial existed at common law, and that such a jury trial was a condition precedent to the depriving of a person of control of his property by the appointment of a guardian or committee, and that this right is guaranteed by the Seventh Amendment.

The Supreme Court has construed the Territorial statute as not providing or permitting a jury trial. It is therefore respectfully submitted that Section 12509, Revised Laws of Hawaii, 1945, is unconstitutional because it violates the provisions of the Fifth and Seventh Amendments to the Constitution.

III. THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN ENTERING ITS JUDGMENT ON WRIT OF ERROR AND DECREE ON APPEAL, IN THAT SECTION 12509, REVISED LAWS OF HAWAII, 1945, AS CONSTRUED AND APPLIED, DENIES APPELLANTS DUE PROCESS OF LAW IN THE FOLLOWING RESPECTS:

A. As construed and applied, this section permits a finding of incompetency without a determination or finding of notice as required by statute and by due process. (Assignment of Error No. 5a.)

Section 12509 requires notice to the supposed insane person. This notice is essential to the jurisdiction of the court to proceed. In *Re Estate of William Brash,* 15 Haw. 372. Since notice is jurisdictional, a finding of proper notice must be made by the court.

See: *McElroy v. Pegg,* 167 F. (2d) 688.
Shields v. Shields, 26 F. Supp. 211, 215.
People ex rel Spencer, 65 N.Y. 1, 4.

In *Hutchins v. Johnson,* 12 Conn. 376, it was held that the court must make a finding that proper notice was given of the application, and if there is no such finding the appointment of the guardian or conservator is void. The court said:

> Another question arises: is this plaintiff a conservator? He has stated, that he was legally appointed; and, of course, he must prove it. The record of his appointment does not show that notice of application was ever given. Notice of such a proceeding, so important to the subject is required by the fundamental principles of justice: *Chase v. Hathaway,* 14 Mass. 224. . . . It would seem, then, as if it would result, as a matter of course, that a fact so important should be shown to the court, before they proceed; and that it must be found by them, before their proceedings can be valid. It is claimed, however, that this fact is proved by the files of the court, viz., the summons and the officer's return. We have held, that the return of an officer is only prima facie evidence, at least not conclusive, of the truth of the fact therein stated; if the return is to be considered as part of the record, the party is concluded by that which we have held not to be conclusive. If it is no part of the record, how is it to be tried in this court? We cannot impanel a jury to test the officer's return. Either way, therefore, the record can not be helped, by the files. We see no reason, if the court below were satisfied that the notice was given, why that fact should not have been found; and for want of such finding this court can not know of its existence.

Hattie Kulamanu Ward did not appear in the proceedings in response to the summons, and no reason was shown for her non-appearance in the record. See Woerner's *Trea-*

tise on the American Law of Guardianship of Minors and Persons of Unsound Mind, Section 119.

There is no finding of the court, at any point in the record, that proper notice was given.

In *Peterson v. Peterson,* 24 Haw. 239, the Supreme Court of the Territory of Hawaii held that it is an established rule that where a court of general jurisdiction is given statutory authority, the requirements of the statute must appear of record and will not be presumed. Specifically, that case holds that its jurisdiction over the person must appear of record.

Since this is a statutory proceeding by a court of limited jurisdiction, and since the record is silent as to the notice required by statute, the order appointing the guardian is void, and appellants were denied due process by the lower court's refusal to so hold.

B. As construed and applied, this section permits the appointment of a guardian ad litem for an adult alleged to be incompetent, without notice to the alleged incompetent. (Assignment of Error No. 5b.)

Section 12509 of Revised Laws of Hawaii, 1945, as construed by the courts below authorizes the appointment of a guardian ad litem before there has been a finding of insanity, and without notice to the alleged incompetent of such appointment. This is improper as a matter of law. See *Mussi's Guardianship,* 84 N.Y.S. (2d) 468; *Warrick v. Moore,* 291 S.W. 950, 956.

The very purpose of the proceeding is to determine insanity, and the appointment of a guardian ad litem presupposes the existence of legal incompetency. A person of legal age, not declared insane, is presumed sane. *Kalanianaole v. Liliuokalani,* 23 Haw. 457.

At the time when the guardian ad litem was appointed in this proceeding, the alleged insanity appeared only by the

verified petition. Woerner, Section 145, states the rule in such cases as follows:

> But if the insanity has been suggested on affidavit, but not legally ascertained, and there is doubt whether proof can be successfully made, the court is without authority to appoint an attorney, and will continue the case to afford an opportunity for an inquisition.

It is respectfully submitted that the appointment of the guardian ad litem for Hattie Kulamanu Ward, at the outset of the proceedings, and without notice to her when she was deemed by law sane, is a violation of due process of law required by the Fifth Amendment to the Constitution of the United States.

C. As construed and applied, this section permits the appointment of a guardian nominated by the petitioning sisters and appointed over the objections of two sisters with equal interest where it affirmatively appeared that the guardian selected might have conflicting interests. (Assignments of Error Nos. 5c and 5d.)

After the appointment of the guardian ad litem in this case, instead of following the usual course of denying the petition and requiring strict proof (*Simon v. Craft,* 182 U.S. 427, 429), the guardian ad litem, after investigation, acceded to the relief prayed in the petition. The guardian ad litem did not cross-examine witnesses or investigate the suitability of any guardian other than trust companies, and although he found that conflict of interests might arise between the estate of the alleged incompetent and the Hawaiian Trust Company, he recommended its appointment on the ground that it would be more satisfactory than other trustees that would be qualified. (R. 139-140).

A guardian whose interests conflict or may conflict with that of the ward's is not a suitable guardian.

It is respectfully submitted that the appointment of the guardian, under the circumstances shown, is an abuse of

discretion to such an extent that it constitutes a denial of due process to appellants.

It affirmatively appeared on the record that a conflict of interest might arise (R. 140), that the appointment of the Hawaiian Trust Company was opposed by two sisters who by virtue of jointly owned property with Hattie Kulamanu Ward had greater interest than the petitioners (R. 137-138), and that the appointment of the trust company would permit petitioners to oust existing management of the family corporation and permit petitioners and those allied with them to secure control.

D. As construed and applied, this section authorizes appointment of a guardian on petition of some relatives without allowing a full and fair hearing to intervening relatives with equal interests and rights in respect to motives of petitioners in seeking appointment of a particular guardian. (Assignment of Error No. 5e.)

Attorney Cass, speaking for appellants, in the hearing on the guardianship petition, sought to question Lani Booth and Edward Hustace, a witness in support of the petition, as to their motives in filing the petition and in seeking to secure the appointment of the Hawaiian Trust Company (R. 125-126; 137-138). Judge Cristy refused to permit questions or a line of questions to elicit this information. (R. 126, 138.)

Judge Cristy ruled:

> The court would have to sustain the objection that the motive of the petitioner is not a thing that would disturb the Court or encourage the Court. It is a question of whether or not there is prima facie proof and ultimately a sufficient proof to indicate the state of competency. (R. 126.)

Attorney Cass asked Edward Hustace:

Would you agree to another trust company? (R. 137.)

Mr. Anthony objected. The court ruled that Mr. Cass didn't

have any standing to object (R. 137). Mr. Cass stated that the examination of the witness was for the purpose of determining whether or not he and his mother have an outside interest which would be served by the appointment of a specific guardian. The court sustained the objection and refused to permit this line of questioning (R. 137-138).

Motive and interest are clearly material and relevant to proceedings for incompetency.

Thus, in *Justus Francke v. His Wife,* 29 La. Ann. 302, the court said:

> In actions for the interdiction of a party for insanity, investigation of the motives of those who are provoking the interdiction are *of the utmost consequence.* The court will guard with peculiar care the alleged lunatic from interference, springing from a hostile motive, and will weigh with more precision the evidence of lunacy, if the person by whom it is tendered appears to be actuated by a sinister intent.

See also *Appeal of John Royston,* 53 Wisc. 612.

It appears affirmatively from the testimony of Lani Booth that she was dissatisfied with the management of her sister's estate by Lucy K. Ward, with whom Hattie Kulamanu Ward had always lived, and in whom she had confidence (R. 125, 129).

Appellants contend that cross-examination as to motive was not only relevant but essential to a proper and fair determination by the court on the issues of competency, and a suitable guardian.

Cross-examination as to motive is always proper on the issue of credibility and interest of a witness. It would seem particularly appropriate in incompetency proceedings to inquire into the motive of petitioner, in order to be satisfied that the end sought is the good of the alleged incompetent and not the selfish gain or advantage of the petitioner. Where, as appears in the record in this case, two sisters initiated and sought the declaration of incompe-

tency and the appointment of the Hawaiian Trust Company, and two sisters opposed the appointment of a guardian, and particularly the appointment of the Hawaiian Trust Company, the motives for the bringing of the petition and for seeking the appointment of a particular guardian should have been subjected to the closest scrutiny.

Instead, Judge Cristy manifested strong partisanship in favor of the petitioners and their choice of guardian, and strong antagonism and challenge to the counsel for the sisters who sought to intervene, impugning their motives and so narrowly limiting the right of cross-examination of their counsel as to make it almost impossible for him to elicit any information for the record.

Judge Cristy could not escape being aware, and indeed showed his awareness, that the impetus for the bringing of the petition was a dispute over the management of the property of the alleged incompetent, the petitioners seeking to change control to a management of their liking.

If there was a conflict of interest between Lucy K. Ward and Kathleen Ward and the interest of Hattie Kulamanu Ward, then there was likewise a conflict of interest with the interest of Hattie Kulamanu Ward and the two petitioning sisters. If the trial court, having determined that it was necessary to appoint a guardian, felt that it was improper to appoint either Lucy K. Ward or Kathleen Ward as guardians, then it was just as improper to appoint a guardian satisfactory to the dissatisfied petitioning sisters and unsatisfactory to the intervening sisters. If there was a conflict of interest, Judge Cristy should have selected either an individual or trust company aligned with neither side, to insure impartiality and fairness to Hattie Kulamanu Ward as well as to all her sisters.

The construction of Section 12509 by the trial judge, sanctioned by the Supreme Court opens the door to gross abuse of the statute in the interest of relatives of an incom-

petent and puts a premium on rushing into court first as a petitioner, in the struggle for control of property. The barbarous concept that only the petitioning relative and not others of equal kinship are entitled to be fully heard can only result in injury to those unfortunates who have property and whom age and insanity overcome.

To require intervenors' counsel to prove Hawaiian Trust Company "a conniver" in the case (R. 137) to have the right to challenge its suitability under the facts and circumstances before the court, when the intervening sisters through their counsel offered to agree to the appointment of any other trust company not so closely allied with the petitioning sisters (R. 137) seems an abuse of discretion of such magnitude as to constitute a denial of due process.

Under the construction of Section 12509 approved by the Supreme Court, those for whose protection Section 12509 was passed have become its prey.

E. As construed and applied, this section denies fair hearing to intervenors having equal status with petitioners, and gives them no standing to object to the selection of a particular guardian or to propose themselves or another guardian. (Assignment of Error No. 5f.)

The trial court indicated that Lucy K. Ward and Kathleen Ward, for whom Attorney Cass spoke, had no standing to make any objections to the appointment of Hawaiian Trust Company (R. 137). Mr. Cass asked permission to file with the court a petition for the appointment of Lucy K. Ward as guardian of the person and estate of Hattie Kulamanu Ward, or if the court should rule that her interest was conflicting, for the appointment of Kathleen Ward (R. 141). The circuit judge stated:

> The court would not listen to a petition by any of the sisters to be the property guardians because of the fact that they, being sisters with individual interests in the consideration of the property, their interest would naturally be conflicting. (R. 141.)

It has been said that in barbarous times, such was the rule of law, but this rule has been wholly rejected by modern English and American jurisprudence.

In Woerner, *Law of Guardianship,* Section 133, it is stated:

> An old English rule discriminated against the heir at law, or the one next entitled to the lunatic's real estate after his death, as custodian of the lunatic's person. This maxim was severely criticized, as not founded on reason, and prevailing only in the barbarous times before the nation was civilized. A similar objection existed, also, though to a far more limited extent, against the next of kin to the lunatic. Both these rules are now disregarded in England as well as in the United States; on the contrary, "the law now supposes that those who stand nearest to the lunatic by the ties of kindred, will treat him with more affection and patient fortitude than strangers in blood."

In *Re Colvin,* 3 Md. Ch. 206, it was held that the power to appoint a committee for an insane person is discretionary with the chancellor, but should not be exercised arbitrarily or capriciously, and without regard to the wishes or recommendations of those interested in the estate, or who feel an interest in the person of the lunatic. The court said:

> And accordingly, though it most frequently happens that the committee is appointed on the nomination of the person who sues out the commission of lunacy, a caveat may be entered against the person so nominated, and when this is done, the recommendations of the parties interested will be considered, and proof taken to aid the Court in making a selection. This is the established practice, and the propriety of it is apparent.

See also, *In Re Cooper,* 94 N.Y.S. 270.

In *Re Wood's Guardianship,* (Wash.), 188 P. 787, it was held that the refusal to appoint petitioning wife guardian of community property of herself and husband, he being

incompetent, was an abuse of discretion. It appeared that the property consisted of a ranch worth $25,000, which the wife had been managing. The court said:

> Our statutes relating to guardianship of mentally incompetent persons do not specify who shall be entitled to such guardianship, so we shall assume for present purposes that the question of who shall be guardian in such cases rests in the discretion of the superior court. This discretion, however, must be exercised in the light of the nature of the property to be managed by the guardian, the relationship of the applicant to the incompetent person, and the interest the applicant has, if any, with the incompetent person in the property. Now to appoint a stranger guardian in this case is to appoint a guardian of property in which Mrs. Wood has a right and interest equal with Mr. Wood.
>
> . . .
>
> Those close to the incompetent by ties of marriage or blood have always been favored by the courts as suitable and proper guardians in such cases. Woerner, American Law of Guardianship §133.

The intermingled interests of appellants with Hattie Kulamanu Ward and their intimate daily association with her give them the strongest claim to consideration by the court.

In the *Matter of Lamoree,* 32 Barb. 122 (N.Y.), it was held that the appointment of a stranger to be committee of the person and estate of a lunatic, without the request of the relatives and next of kin of the lunatic, without an order of reference, and without notice to the persons having a prospective interest in the estate, is not authorized by the practice of the courts. If, on the other hand, it was held, the next of kin unite in a petition and name a proper person as committee, or give their consent in writing to the appointment of a particular person, it is usual to select such person. But if the next of kin have not assented, or united in the petition, there should be an order of refer-

ence, and then the next of kin are entitled to notice of the proceedings upon the reference, and to propose themselves as the committee.

A petition was filed requesting the appointment of a committee consisting of a nephew and brother-in-law of the alleged lunatic. The court said:

> The law in dealing with the persons and estates of that unfortunate class who are bereft of reason and intelligence proceeds upon principles which must commend themselves to the sanction and approbation of every humane and enlightened mind. Considering the close and intimate relations which the committee must maintain with the family and relatives of the lunatic, his power of control—all but absolute— over his person and property, the remote possibility of his ever being in a condition to make any disposition of his estate which shall prevent its descent and transmission to the heirs at law and next of kin, *a rule of practice or of positive legislation which would justify the appointment of a stranger to execute the trust of committee, without the assent and against the will of his family or other relatives, and without any sufficient or adequate cause would be oppressive and intolerable. It would be little less offensive than to deprive a person of his property without cause, and without authority of law.*
>
> . . . . .
>
> In conclusion, we think the order appointing the committee was improvidently granted, and whenever it was brought to the notice of the county court it should have been vacated.

In *Taff v. Hosmer,* 14 Mich. 249, the court held that in the absence of statutory regulations concerning the persons entitled to be heard on applications for the appointment of guardians for a minor, under will or otherwise, resort must be had to the practice in chancery from which probate jurisdiction in guardianship cases is derived; and as the next of kin were entitled by that practice to be heard, they should be allowed to appear in the probate court. The

court held further that any one entitled to be heard on such application must be regarded as entitled to appeal from an adverse decision.

The court said, at page 254:

> . . . There can be no doubt that the judge of probate is the ultimate arbiter in the selection, but if no one else has any right to intervene to aid him in making a good and rejecting a bad choice, the condition of a helpless child would be most deplorable. . . .
> We do not think that the matter has been left in such an anomalous condition. . . .
> It is apparent that if there are not some persons besides the infant who have an absolute right to present their views concerning guardianship, his interests will often be at the mercy of persons by no means calculated to protect him. . . .
> We are entirely satisfied that the next of kin may, if they see fit, make themselves parties to guardianship proceedings, and that when they do so, they may appeal from an adverse decision.

It is respectfully submitted that the trial judge committed prejudicial error and abused his discretion in holding that the intervening sisters had no standing to object, and had conflicting interests as a matter of law, and that this error was prejudicial to appellants and deprived them of the full and fair hearing required by law.

F. Section 12509 is wanting in due process because, as construed and applied, it permits the appointment of a guardian without a finding of insanity. (Assignment of Error No. 5g.)

Prior to this case, the Supreme Court of the Territory of Hawaii had held that Section 12509 required a finding that the person is non-compos or insane to such a degree as to be incapable of taking care of himself and his property. *Guardianship of Kawai,* 33 Haw. 643.

In *Rhoads v. Rhoads,* (Ohio), 163 N.E. 724, 726, the court said, in terminating guardianship proceedings:

> It certainly cannot be expected that a man advanced in years will retain the same mental powers at 80 that he possessed in his younger years. It occurs to us that that can hardly be expected, and we are quite sure that the law does not contemplate such a condition.
> In passing we need but suggest that a person's memory may be impaired, his body may become weak and feeble by reason of age or other infirmities. He may occasionally at times ask questions that may seem out of place, or he may repeat questions and conversations, and may be forgetful at times, yet it cannot be said that such are the constituent elements of and the only test of mentality, and that under such circumstances one is unable to care for his estate and property interests, or that by reason of same he is mentally incapacitated for caring for and preserving an estate of $7,000.

No finding of insanity was made, nor was any decree entered finding Hattie Kulamanu Ward insane. It has been held that without such finding and decree, the appointment of the guardian is void. Thus, in *Chase v. Hathaway,* 14 Mass. 221, 226, the court said:

> We have been surprised of late, to find an irregularity in the probate offices in several of the counties, which we think it is important should be corrected in their future proceedings. It consists in the omission to enter of record orders and decrees, which often have an essential and final effect upon property to a very considerable amount. In the case now before us, it appears that no formal decree was ever passed, declaring the appellant non compos; or, if passed, that the only evidence of it rests in the recital which precedes the letter of guardianship. In a late case in Cumberland, the only evidence of a decree, allowing and approving a last will and testament was of the same nature. This seems to us as irregular as it would be for a common law court to issue execution, without any evidence of a judgment except what might be contained in the execution.

See also *Burke v. McClure,* 245 S.W. 62 (Mo.).

Appellant Lucy K. Ward, as next friend of Hattie Kulamanu Ward, offered to prove, at the hearing on her motion to vacate the appointment of the guardian by testimony of a qualified alienist, that Hattie Kulamanu Ward was competent:

> to determine whom she wishes to handle and to represent her in her affairs, although she needs help in the management of her affairs. (R. 153.)

See *Appeal of Hogan,* 194 A. 854; *Allis v. Marton,* 4 Gray (Mass.) 63, 64; *In Re Bryden's Estate,* 61 A. 250 (Pa.); *Denner v. Beyer,* 42 A. (2d) 747 (Pa.); *In Re Gottsman,* 48 A. (2d) 800; *In re Walter's Estate,* 208 P. (2d) 713; *In re Mills,* 27 N.W. (2d) 375; *In re Williams,* 298 N.Y.S. 883.

To uphold the appointment of a guardian without the finding required by the statute, creates a hazardous course for persons of old age, and opens the door for avaricious relatives who are not content to permit their relatives with property to enjoy their property and manage it as they see fit in the declining years of their life. Appellants contend that such a finding is necessary to constitute due process.

IV. THE SUPREME COURT OF THE TERRITORY, IN AFFIRMING THE ORDER VACATING THE APPOINTMENT OF LUCY K. WARD, NEXT FRIEND OF HATTIE KULAMANU WARD, DISSOLVING THE TEMPORARY RESTRAINING ORDER AND DENYING THE MOTION TO SET ASIDE THE ORDER APPOINTING THE GUARDIAN OR TO REMOVE THE GUARDIAN, DENIED APPELLANTS DUE PROCESS OF LAW. (Assignment of Error No. 6.)

The motion and offers of proof made on the return day, of the verified motion of Lucy K. Ward, next friend of Hattie Kulamanu Ward, are summarized in the Statement of the Case, *supra,* page 8 (R. 28-47, 147-148).

On the basis of the allegations of the verified motion and the offers of proof made, the very minimum that equity and justice and due process requires is that the court show neutrality in the family dispute by appointing an impartial person or agency, and not one antagonistic to some of the disputants, and one committed to a course of action acceptable to the remaining disputants, but not to others.

See *Matter of Lamoree,* 32 Barb. 122, 124, supra; *In re Rothman,* 188 N.E. 147; *In re Dietz,* 287 N.Y.S. 392; *In re Pfleghar,* 62 N.Y.S., 2d 899.

In the words of the New York Court of Appeals in *Matter of Lamoree, supra,* it is oppressive and intolerable to force a guardian unsatisfactory to appellants Lucy K. Ward and Kathleen Ward on them, when because of the property jointly owned by them with Hattie Kulamanu Ward, the result is that they cannot do as they see fit with their own property without the consent of a guardian unsatisfactory to and antagonistic to them.

V. THE COURT ERRED IN REFUSING TO CONSIDER ON THE MERITS CERTAIN ASSIGNMENTS OF ERROR ON THE GROUND THAT THEY WERE NOT MADE THE SUBJECT OF EXCEPTIONS, IT BEING SETTLED LAW IN THE TERRITORY THAT IN PROCEEDINGS IN CHAMBERS EXCEPTIONS ARE UNNECESSARY AND THAT ERRORS APPARENT ON THE FACE OF THE RECORD MAY BE CORRECTED BY WRIT OF ERROR REGARDLESS OF THE TAKING OF EXCEPTIONS.
(Assignment of Error No. 7.)

The Supreme Court of the Territory of Hawaii denied appellants due process of law by refusing to consider on the merits the certain questions presented under the writ of error on the ground that they were not made the subject of exceptions at the chambers hearing in probate.

It has never been the practice in the Territory of Hawaii to note exceptions in chambers proceedings, and this seems to be generally accepted practice in most states. 3 C.J.,

Appeal & Error, Section 808 (2). It has been regarded as settled in the Territory that errors apparent on the face of the record may be corrected by writ of error regardless of the taking of exceptions.

Thus, in *Cummings v. Iaukea,* 10 Haw. 1, the Supreme Court of the Territory of Hawaii disposed of the contention that defects apparent on the record on the writ of error must be raised below by demurrer or exception, saying:

> The counsel for the plaintiff in error is under the impression that in order to avail himself of a writ of error he must have raised the point in the Court below and perfected his exceptions, if not sustained. This is not the law. 'Any error appearing on the record, either of law or fact, or any cause which might be assigned as error at Common Law,' may be corrected by writ of error. . . .
>
> It was competent for plaintiff in error to have petitioned for his writ, within the statutory time, even though he had demurred, and even if he had not demurred and the record did not state that the demurrer had been argued and decided against him and that he had excepted to the ruling. . . .

In any event, as appears from the transcript of the proceedings, appellants' objections on the points which the Supreme Court refused to consider were through Attorney Cass made known to Judge Cristy during the course of the hearing.

VI. THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN ITS CONCLUSION THAT SECTION 12529 DOES NOT AFFORD APPELLANTS, AS A MATTER OF RIGHT, A HEARING ON THE MERITS OF THE MOTION TO REMOVE THE HAWAIIAN TRUST COMPANY, LIMITED, AS GUARDIAN ON THE GROUND OF UNSUITABILITY. (Assignment of Error No. 8.)

Section 12529, Revised Laws of Hawaii, 1945, provides in relevant part:

> Where any guardian appointed either by a testator or by any of the judges hereinbefore mentioned, shall become . . . unsuitable therefor, or where it shall appear to any of such judges that it would be for the best interests of the minor[10] to remove the guardian of its person, any of the judges after notice to such guardian and to all others interested, may remove him. . . .

The Supreme Court of the Territory of Hawaii read into and construed Section 12529 in a manner inconsistent with the language of that section. While it may be true that Section 12529 is prospective in operation, appellants, insofar as their motion to remove the guardian is concerned, sought only prospective operation. In their motion, appellants alleged the unsuitability of the trustee on the ground of conflicting interests, which conflicting interests were spelled out in the verified motion. Section 12529, by its terms, does not limit the time at which removal may be sought.

The allegations in the verified motion of conflicting interests clearly make out a case of unsuitability. It is one of the most basic principles of guardianship and trusts that no guardian be appointed whose interests may be conflicting. The inconsistency of the trial court in holding as a matter of law that Lucy K. Ward and Kathleen Ward, most of whose property was owned jointly with the alleged incompetent's, had conflicting interests, while the Hawaiian Trust Company, which engaged in the same kind of business in respect to the management of property as Victoria Ward, Limited, did not have such conflict of interests is apparent.

The allegations of conflicting interests of the guardian, set forth in the verified motion, meet the statutory requirements of 12529, and the Supreme Court, by its construc-

[10] While the word "minor" is used, the section is a part of Chapter 305, which contains Section 12507 and other matters applying to guardians of insane persons as well as minors.

tion of this section, deprived appellants of the right to a hearing given by Section 12529.

VII. THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN ITS CONCLUSION THAT THE MANIFEST BIAS AND PREJUDICE SHOWN BY THE CIRCUIT JUDGE AGAINST APPELLANT LUCY K. WARD, NEXT FRIEND OF HATTIE KULAMANU WARD, DID NOT CONSTITUTE A DENIAL OF DUE PROCESS OF LAW. (Assignment of Error No. 9.)

The due process clause of the Fifth Amendment to the Constitution of the United States guarantees that all persons in the Territory shall have a full and fair hearing before an impartial and unbiased judge.

In the hearing of the motion to vacate the appointment of the guardian or to remove it, the trial judge manifested strong bias and prejudice against Lucy K. Ward, as next friend of Hattie Kulamanu Ward. At the very outset of the hearing, Judge Cristy stated:

> So that the issue at the proceeding of the incompetence of the person Hattie Kulamanu Ward was before the Court on prima facie evidence conceded by the counsel for your client as being sufficient, and not desiring any further evidence on it, the finding then stood, *which by inference indicated that your client over a period of years has acted under a power of attorney, not disclosing the incompetence, which brings the matter in this proceeding a little bit closer home that she is before this Court with unclean hands, assisted by you.* (R. 150.)

Lucy K. Ward filed the motion as next friend of Hattie Kulamanu Ward, and on her behalf. Lucy K. Ward was not on trial. The only statements concerning her or her conduct of her sister's affairs that appear in the record are:

1. The allegation in the petition "That at the present time, due to the incompetence of said Hattie Kulamanu Ward, her business affairs are being conducted by her sister, Lucy K. Ward, as attorney-in-fact and

there is or may be a conflict of interests between Hattie Kulamanu Ward and her attorney-in-fact, Lucy K. Ward.

2. The testimony of the petitioner, Mellie E. Hustace that Lucy Ward had invested some of Kulamanu's money and some of her own money in a ranch on Molokai, and she doubted the wisdom of it, and did not think it was right.

There is no obligation or duty on friends or relatives to file a petition for the adjudication of insanity or appointment of a guardian of a person, even where the insanity may exist without question. Perhaps most frequently, motives of love, humanity and consideration dictate that such petitions are not filed. It was improper, therefore, to accuse Lucy K. Ward of "not disclosing the incompetence of her sister," even if such incompetence existed prior to the filing of the petition. It appears of record that Hattie Kulamanu Ward had been, with the knowledge of petitioners, an officer of the family corporation for many years, and that the petition was filed only after differences arose in the management of the family corporation.

As has been pointed out, no finding was made by the trial court that Hattie Kulamanu Ward was insane, and even if such finding had been made, it would not relate back to a period prior to the entry of such a decree.

Again, Judge Cristy stated:

> There is one other factor that is in this record which I want to emphasize and comment upon. There has now been filed an inventory by the guardian showing that in 1947, during the period in which the evidence before this Court at the former hearing, indicated that the sister had been incompetent over a period of years, and Lucy Ward, acting under a power of attorney given years before by such an incompetent person, mortgages large values of stock of her sister to take a joint tenancy in a ranch, a joint tenancy with rights of survivorship; in other words, *feathering her own possible bed in case*

> *she survives her sister, to get into her hands a property that according to the very note has some $350,000 or $400,000 of value, hocked in the Ward's property, a thing which the guardian of the property of Hattie Kulamanu Ward will have to go into as to whether such a deal is a proper deal in the protection of the rights of the ward.* And that person, your client, now by a change of counsel purports to start a proceeding as next of friend, and the Court at this time is prepared to vacate that order of appointment of next of friend at this time without any further hearing . . . (R. 176).

The inventory showed no more than that the ward has an interest jointly with Lucy K. Ward in some 13,000 acres of land on Molokai. There was and is nothing in the record justifying a charge of bad faith, fraud, or improper conduct against Lucy K. Ward in the management of the affairs of Hattie Kulamanu Ward, nor anything to bear out the statements of the circuit judge which conclusively show his prejudgment of the issue without hearing and his bias against Lucy K. Ward.

The appellants offered to prove and stated in her verified petition that the property of Hattie Kulamanu Ward was being properly cared for. The circuit judge, while denying an opportunity to prove this, yet passed judgment without being apprised of the facts.

Counsel for appellant took exception to the remarks of the court as manifesting against Lucy K. Ward such a bias and prejudice as would disqualify him to act, and asked him to permit the matter to be heard by another judge.

At the close of the hearing, after castigating counsel for appellant and denying bias and prejudice, the court stated:

> I haven't accused Miss Ward of stealing from her sister. That is your language. (No such language was used by counsel.) I have carefully refrained from any personal aspersions on the character of Miss Lucy Ward, but she has been caught in a situation where the situation speaks for itself. (R. 228.)

Due process is not such a matter of shadow, lacking substance, that if the litigant is taken by surprise by an unexpected antagonism and animosity of the judge, he is helpless. Appellate courts have zealously scanned the record to see that the substance of due process and a full and fair hearing is accorded all litigants by trial judges.

In *Leonard v. Wilcox,* et al., 101 Vt. 195, the court held that a case of bias and prejudice had been made out. The court said:

> When a judge feels and expresses doubt that any evidence, covering matters which have transpired since a former hearing of the same issue, the purport of which he does not know, but which, presumably is material and relevant, will change his conviction then reached, he has admitted his bias, and has disqualified himself from proceeding further in the hearing. A litigant ought not to be compelled to submit to a judge who has already confessedly prejudged him, and who is candid enough to announce his decision in advance, and his serious doubt that he would do otherwise than adhere to it, no matter what the evidence might be.

In the instant case, at the very outset of the supposed hearing on the verified motion of appellant Lucy K. Ward, next friend of Hattie Kulamanu Ward, the trial judge accused Lucy K. Ward of concealing the incompetence of Hattie Kulamanu Ward for a period of years and coming into court with unclean hands, assisted by counsel (R. 150).

Moreover, the trial court completely ignored the fact that Lucy K. Ward was before the court on behalf of Hattie Kulamanu Ward, and not on her own behalf.

On the right to a fair and impartial judge as a requirement of due process, see

N.L.R.B. v. Ford, 114 F. (2d) 905, cert. den. 312 U.S. 689.

Lee v. Fleming, 158 F. (2d) 984.
Rosenberg v. Boun, 153 F. (2d) 10.
United States v. Downes, 142 F. (2d) 477.
Evans v. Superior Court, 107 App. 372.
Tebout's Case, 9 Aff. Prac. 211 (N.Y.).
Warrick v. Moore Co., 291 S.W. 950, 956.

It is respectfully submitted that appellant Lucy K. Ward, next friend of Hattie Kulamanu Ward, was denied due process of law by reason of the bias and prejudice of the trial court against her, shown by his injudicious remarks as to her character, unsupported by any factual basis, and that the Supreme Court of the Territory of Hawaii should have remanded the verified motion to the circuit court to be heard before an impartial and unbiased judge.

CONCLUSION

Appellants respectfully submit that the decision of the Supreme Court of the Territory of Hawaii, and the judgment and decree based thereon, should be reversed on the grounds herein set forth.

DATED at Honolulu, T. H., this 23rd day of October, 1951.

Respectfully submitted,

Bouslog & Symonds

By.....
Harriet Bouslog

Attorneys for Appellants, Lucy K. Ward, Next Friend of Hattie Kulamanu Ward, and Lucy K. Ward and Kathleen Ward.